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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MOHAMMED AZAD and DANIELLE BUCKLEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TOKIO MARINE HCC – MEDICAL INSURANCE SERVICES GROUP, HEALTH INSURANCE INNOVATIONS, INC., HCC LIFE INSURANCE COMPANY, and CONSUMER BENEFITS OF AMERICA,

Defendants.

Case No. 4:17-cv-618-PJH

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT HEALTH INSURANCE INNOVATIONS, INC.'S MOTION TO DISMISS AND TO STRIKE**

Date: June 14, 2017
Time: 9:00 a.m.
Place: Courtroom 3

Complaint Filed: February 7, 2017

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## MEMORANDUM OF POINTS AND AUTHORITIES

## ISSUES TO BE DECIDED

1. Whether the facts alleged in Plaintiffs' Complaint provide sufficient notice of the specific behavior of Defendant Health Insurance Innovations, Inc. ("HII") giving rise to Plaintiffs' claims.

2. Whether allegations detailing regulatory scrutiny of Defendant HII—in connection with its marketing and sale of insurance policies like those at issue in this litigation—are properly included with the Complaint.

## INTRODUCTION

Defendant HII's Motion to Dismiss and to Strike[1] rests on a single, faulty premise: that the allegations in Plaintiffs' Complaint do not sufficiently distinguish HII's culpability from that of its co-defendants. However, the allegations in the Complaint demonstrate that HII is actively involved in the marketing of the fraudulent Short-Term Medical ("STM") insurance policies that are challenged in this litigation, and that HII developed and offers these plans *jointly* with HCC. These plans, which Plaintiffs purchased, are the heart of the Complaint: the STMs contain a series of hidden exclusions and conditions precedent, such that Class members do not have their timely and proper claims honored under their policies. In light of these hidden, unlawful, and unconscionable obstacles and Defendants' post-claims underwriting, the marketing of the STMs is deceptive. The facts alleged in the Complaint—including many taken verbatim from HII's own statements and from public records, and as fully corroborated by HCC's improperly-submitted and premature declarations in support of its Motion to Dismiss—demonstrate HII's culpability for its role in the marketing and administration of STMs in California.

HII's other argument is to strike the references to regulatory actions against HII for its illegal and deceptive marketing of its STMs, as detailed in paragraphs 51-52 of the Complaint. Mot. at 10-11. This is without basis, especially in light of HII's argument effectively disavowing

[1] Defendant on this motion is Health Insurance Innovations, Inc. ("HII"). HCC Life Insurance Company and HCC Medical Insurance Services LLC ("HCC") and Consumer Benefits of America ("CBA") are also Defendants in this action, and are included within the term "Defendants" where no specific Defendant is indicated.

its threshold involvement with the practices at issue, even apart from the question of these common practices' legality. As the Complaint specifically states, these data points "underscore[] the systematic nature of the practices" complained of, with regard to HII's marketing and sales. Compl. ¶ 51. Further, these paragraphs specify that the STM policies HII fraudulently marketed—which were at the heart of the regulatory investigations—were policies jointly developed with HCC. *Id.* ¶ 52. Far from being "immaterial and impertinent," these allegations put HII on notice of the precise activity, conducted either jointly with or on behalf of HCC, from which Plaintiffs' claims arise.

HII's motion should be denied it its entirety.

## FACTUAL BACKGROUND

As a threshold matter, Defendant's Motion does not and cannot challenge the accuracy of the facts stated in Plaintiffs' Complaint, and in fact barely addresses the allegations contained therein. As described below, Defendant HII has developed the STMs at issue in conjunction with Defendant HCC and, along with Defendant CBA, provides the STMs to Class members, in violation of California law.

### A. Defendants' Sale and Administration of Short-Term Medical Insurance Policies

Defendants HCC, HII, and CBA collectively market and administer STMs to California consumers. Compl. ¶¶ 17-18, 22, 22 n.5, 23, 51-53, 55, 57. Defendants HCC and HII have jointly developed—and market and provide—their STM in 45 states, including California. *Id.* ¶¶ 17, 22, 22 n.5, 23, 51-53, 55. As referenced in Plaintiffs' Complaint, HII "partners with HCC . . . to expand [its] short-term medical portfolio" and provide STMs to consumers. *Id*. at n.5. The document referenced in the Complaint—a June 3, 2013 press release from HII—further clarifies that HII "creates customizable and affordable, high-quality health insurance products and supplemental services through partnerships with best-in-class carriers." *See* HII Press Release, *Health Insurance Innovations Partners with HCC Like Insurance Company to Expand Short-Term Medical Portfolio*, (Jun. 3, 2013), available at

http://investor.hiiquote.com/releasedetail.cfm?ReleaseID=775244; *see also* Compl. at n.5.[2]

Defendant CBA colludes with HCC and HII by acting as the group administrator for the STMs, thereby allowing HCC and HII to avoid more stringent regulatory requirements governing individually-issued health insurance policies. Compl. ¶¶ 18, 57.

**B. Defendants' Common Alleged Practices Cause Common Injuries**

In conjunction with Defendants HCC and CBA, HII's claim processing procedures for their STMs—and the requirements placed upon the insureds—are purposely engineered and uniformly applied to cause the delay and denial of the claims of policyholders. *Id.* ¶¶ 3, 54, 56, 58-73. Upon submitting claims, insureds are required to provide every identifiable medical record in the last five years of their history, regardless of whether such record relates to the claim at issue, and notwithstanding that this requirement is not disclosed in advance. *Id.* ¶¶ 3, 26-27, 33-37, 39-73. This requirement, common to all Class members, gives Defendants three common avenues for denying valid claims, effectively and improperly guaranteeing that Class members' often large bills go unpaid.

The ***first*** step in the strategy is to comb through all records provided by the insured in an effort to characterize the claim at issue as a "pre-existing condition." *Id.* ¶¶ 3, 26-27, 33-37, 39-57, 62-73. Defendants uniformly omit any appropriate explanation of the scope of this exclusion from their public-facing marketing materials. *Id.* ¶¶ 3, 39-57, 63-73. However, once a claim is submitted, the term is interpreted so broadly and incorrectly, and in such bad faith, as to encompass virtually any medical condition, regardless of when—or even whether—it was diagnosed or treated. *Id.* If the insured's presented claim can be linked to *anything* in the

[2] The Court may take judicial notice of HII's press release, Compl. ¶ 22, n.5, as well as the Montana Notice of Proposed Agency Action issued to HII, *id.* ¶ 52, as both "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *See, e.g., Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information "made publicly available by government entities" and websites where "neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein"); *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 970 (E.D. Cal. 2004) ("[M]atters of public record may be considered, including pleadings, orders, and other papers filed with the court or records of administrative bodies."). The press release is identified in the Complaint by a URL that resolves to a page on HII's own website, while the Notice of Proposed Agency Action is a document produced as the result of an administrative proceeding in the public record.

insured's past, *from any point in time*, the claim is denied. *Id.*

***Second***, when there is no plausible way to link an insured's claim to a prior medical condition, Defendants again demand to search through all available records—regardless of their relation to the claim—seeking evidence of a condition that would have rendered the claimant ineligible for coverage under the STM, thereby allowing Defendants to void the policy and not pay the claim. *Id.* ¶¶ 3, 26-27, 33-37, 56-73. This practice is also uniform to all Class members. *Id.*

***Third***, Defendants' policy and practice is to premise refusals to pay on common and incorrect assertions that there is insufficient information to process claims. *Id.* ¶¶ 3, 26-27, 33-37, 54, 58-73. This allows Defendants to sidestep paying proper claims because it would be impossible for the insured to provide the level of detail purportedly needed. *Id.*

In light of the above, common conduct, Defendants have also engaged in serial and uniform misrepresentations and omissions to Class members. Namely, they have marketed health insurance policies that, because of the unconscionable claims-handling processes described above, improperly and unlawfully exclude material numbers of claims, making the insurance nearly worthless. *Id.* ¶¶ 3, 39-57; 104-114. Through various declarations, HCC has introduced copious pages of website screen shots and welcome kits. *See*, *generally*, Dkt. Nos. 50-52. However, none of these documents, nor any documents referenced in Plaintiffs' Complaint, alert an insured or a prospective insured to the virtually limitless exclusions (or burdensome record requests) applied by Defendants in their claims-handling practices. *Id.*; *see also* Compl. ¶¶ 3, 39-72; 104-114. This constitutes false advertising. *Id.* ¶¶ 104-14. Indeed, Defendant HII's poor behavior in the course of marketing its policies was the subject of intense regulatory scrutiny over the last several years, in several states. *Id.* ¶¶ 50-52.

Defendants' internal policies and procedures, public-facing representations, and customer service scripts reveal that the above-described practices are uniform to the Class. A whistleblower contractor in HCC's customer service department confirmed that these policies and procedures are designed to frustrate Class members' attempts to appeal a claim's denial or to provide the information purportedly sought by Defendants, and further confirmed that Defendants

have created a rigid script for dealing with insureds, from which their employees cannot deviate. *Id.* ¶¶ 58-72. As the whistleblower states: "[T]he name of the game is runaround. . . . It really felt like everything was designed to be so cumbersome that the customer would either get frustrated and give up or they could stall long enough to not have to pay out on the claim. . . . The whole idea here is that we're a legal buffer between HCC and [the insured] as was made crystal clear in training when they said outright that we'd be thrown under the bus if we ever deviated from the script." *Id.* ¶ 67.

As discussed in Plaintiffs' Opposition to Defendants' Motion to Stay (Dkt. No 66), Defendants minimize and misconstrue the Complaint, asserting that 'Plaintiffs say X is non-disclosed but it is disclosed.' This misses the point. Defendants engage in a common and fraudulent scheme whereby they take Class members' premium payments, only to subject those insureds to a claims process that is designed to uniformly and unconscionably deny the payment of valid claims. Plaintiffs' well-pleaded claims of complex fraud are cognizable under statutory and common law. Compl. ¶¶ 90-146. Further, HII's role in the matter is clearly laid out, as it is indisputable that the company (1) markets the STMs to Class members and (2) jointly developed those STMs with HCC, with their unconscionable exclusions and conditions precedent.

**C. Plaintiffs' Experiences and the Underlying Litigation**

Plaintiffs Azad and Buckley were, respectively, insured under Defendants' STMs. *Id.* ¶¶ 19-38. Plaintiff Azad purchased his STM through HII. Compl. ¶ 22; Declaration of Dan Garavuso ("Garavuso Decl.") (Dkt. No. 51) ¶¶ 1-4; *id.* at Exs. A-B. Each Plaintiff purchased their STM policies in the belief that such policies would cover unexpected medical conditions. Compl. ¶¶ 19-38. Each Plaintiff *did* suffer an unexpected and major health incident and, in reliance upon the language of the policies, properly submitted claims. *Id.* Upon submitting claims to Defendants, however, each Plaintiff was asked for an ever-increasing number of medical records. *Id.* Specifically, as pled in the Complaint and supported with explicit references to Defendants' records, Plaintiffs' were not merely required to provide medical records relevant to their claims; rather, they were required to provide *all* medical records, provider notes, and labs for the five years preceding their claims. *Id.* ¶¶ 26, 33; *see also* Declaration of John Padgett in

Support of HCC Life Insurance Company and HCC Medical Insurance Services, LLC's Motion to Dismiss and Their Alternative Motion to Strike Class Allegations ("Padgett Decl.") at Exs. 16-19.

After months of complying with Defendants' requests for more information, both Azad and Buckley were again told that their claims could not be processed. Compl. ¶¶ 26-28, 33-38; Padgett Decl. at Exs. 16-19. Plaintiff Azad's bills totaled roughly $12,000, and Plaintiff Buckley's roughly $3,500. Motion to Stay (Dkt. No 63) at n.4. Plaintiffs each made continual efforts to provide sufficient information to Defendants, and were continually asked for more. Compl. ¶¶ 26-38. Discouraged and convinced that Defendants were not acting in good faith, Plaintiffs gave up and realized they would have to pay their medical bills directly. *Id.*

Thus, like all Class members, Plaintiffs were: (1) misled into purchasing insurance policies that they believed would cover unforeseen medical events; (2) subjected to Defendants' unconscionable claims-handling practices, despite complying in good faith with Defendants' increasingly-unreasonable (and impossible to fulfill) requests; and (3) ultimately had their claims files closed by Defendants, in bad faith, which left Plaintiffs (like all Class members) on their own to resolve their unpaid, substantial medical bills.

### D. Procedural History

Plaintiffs filed their Complaint on February 7, 2017, alleging five claims for relief: (1) violations of Cal. Bus. & Prof. Code § 17200, *et seq.*; (2) violations of Cal. Bus. & Prof. Code § 17500, *et seq.*; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; and (5) unjust enrichment. Defendant HII then filed the instant Motion to Dismiss and to Strike. Dkt. No. 60 ("Mot.").[3]

## LEGAL STANDARDS

### A. Rule 12(b)(6)

Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks "a cognizable legal theory" or "sufficient facts to support a cognizable legal theory." *Shroyer v. New*

[3] Each Defendant filed a separate Motions to Dismiss (Dkt. Nos. 48, 58, 60) and, in the case of HCC and HII, Motions to Strike (Dkt. Nos. 49, 60), as well as a Motion to Stay (Dkt. No. 63).

*Cingular Wireless Servs., Inc.*, 606 F.3d 658, 664 (9th Cir. 2010). The issue is not whether the non-moving party will ultimately prevail but whether it is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Moreover, the Court must draw "all reasonable inferences from the complaint in [plaintiffs'] favor," *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc), and "must accept as true all of the factual allegations contained in the complaint" and "construe them in the light most favorable to the plaintiffs." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177 (9th Cir. 2009).

**B. Rule 9(b)**

Plaintiffs' claims under the deceptive prong of the UCL and FAL must satisfy 9(b).[4] The Ninth Circuit has long construed 9(b) to require only that "'allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *United States for Use and Benefit of HCI Sys., Inc. v. Agbayani Construction Co.*, No. 14-cv-02503-MEJ, 2014 WL 4979336, at *3 (N.D. Cal. Oct. 6, 2014) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)).

Thus, while 9(b) imposes a heightened standard, it does not require a plaintiff to allege each and every detail about the alleged conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) ("[W]e cannot make Rule 9(b) carry more weight than it was meant to bear."); *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973); *see also Schlagal v. Learning Tree Int'l*, No. CV 98-6384 ABC (EX), 1998 WL 1144581, at *8 (C.D. Cal. Dec. 23, 1998) ("The Court must strike a careful balance between insistence on compliance with demanding pleading standards and ensuring that valid grievances survive."); *Davenport v. Seattle Bank*, No. CV 15-04475-BRO (JEMx), 2015 WL 6150296, at *4 (C.D. Cal. Oct. 15, 2015) ( "[Rule 9(b)] must be read in

[4] Plaintiffs' other claims—namely, the common-law claims and the claims under other prongs of the UCL—need not satisfy 9(b). Under Ninth Circuit law, "where fraud is not an essential element of a claim, only allegations ('averments') of fraudulent conduct must satisfy the heightened pleading requirements. Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).

harmony with Fed. R. Civ. P. 8's requirement of a 'short and plain' statement of the claim.").

Moreover, "the requirement of specificity is relaxed when the allegations indicate that a defendant must necessarily possess full information concerning the facts of the controversy or when the facts lie more in the knowledge of the opposite party." *Comerica Bank v. McDonald*, No. C-06-03735 RMW, 2006 WL 3365599, at *2 (N.D. Cal. Nov. 17, 2006).

Plaintiffs' fraud-based allegations readily satisfy the requirements of Rule 9(b).

## ARGUMENT

Defendant argues that Plaintiffs fall short of the "plausibility" standard under *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). However, Plaintiffs have asserted extensive and specific factual allegations regarding HII's involvement in Defendants' unlawful scheme. These well-pleaded and extensive allegations, coupled with the reasonable inferences to which Plaintiffs are entitled, show that the allegations against HII are the opposite of conclusory: they are pointed, specific, and compelling. *See Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.") (citation omitted). Plaintiffs plausibly allege HII's liability on each claim for relief, and HII's motion should be denied in its entirety.

### A. The Complaint Alleges Sufficient Facts Linking HII to the Conduct

HII contends that Plaintiffs have not done enough to distinguish between the bad acts of HII and the other Defendants. However, HII's formalistic objection does nothing to rebut the Complaint's plain allegations that HII is specifically liable on Plaintiffs' claims for relief: HII described itself as a "partner" of HCC (Compl. ¶ 55), jointly marketed and sold the policy in question to Plaintiff Azad (*id.* ¶ 22), and has been the subject of regulatory action for its unscrupulous insurance sales schemes (*id.* ¶¶ 51-57). HII's vital role in marketing and administrating the plans underwritten by HCC exposes it to statutory or common law liability for the misconduct complained of. *Id.* ¶ 59.

Rule 8 provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(20). Nothing in the Complaint

forces HII to "speculate as to the wrong Plaintiffs have alleged they committed," and nothing in the Rules prevents the filing of well-pleaded claims against co-defenants who have relationships that are complex and even opague, but that exist all the same and that harm plaintiffs, separately and working in tandem. *Foth v. BAC Home Loans Servicing, LP*, No. CV 11-00114 DAE-BMK, 2011 WL 3439134, at *5 (D. Haw. Aug. 4, 2011); *see, e.g.*, *Fid. Nat. Title Ins. Co. v. Castle*, No. C 11-00896 SI, 2011 WL 6141310, at *3 (N.D. Cal. Dec. 8, 2011) ("By referencing the 'Defendant Parties' . . . one is put on notice as to which defendants are alleged to have been involved in the 'Fraudulent Transactions' described [elsewhere in the complaint]."); *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1164 (D. Idaho 2011) (holding plaintiffs did not need to describe the "who-what-when-where-why" of each defendant in a multi-party scheme where their "basic role in the alleged scheme" was adequately alleged).

Here, it cannot be disputed that HII was involved in the marketing and sale of Plaintiff Azad's STM policy. *See* Garavuso Decl. ¶¶ 1-4; *id.* at Exs. A-B. Nor is it disputed that HII expressly and publicly stated that it is a "partner" of HCC in the development of the STMs. Compl. ¶ 55. Although HII's Motion studiously avoids addressing the statement, HII has publicly claimed that, as a "partner[]" of HCC, it "creates customizable and affordable, high-quality health insurance products and supplemental services through partnerships with best-in-class carriers" including, specifically, the STMs at issue in this litigation. *See* HII Press Release, *Health Insurance Innovations Partners With HCC Like Insurance Company to Expand Short-Term Medical Portfolio*, (Jun. 3, 2013);[5] *see also* Compl. at n.5. Plaintiffs' claims arise from (1) the development and administration of STMs that contain material, unconscionable, and hidden exclusions and conditions precedent; and (2) the deceptive marketing and sale of those same STMs. As discussed above, Plaintiffs have sufficiently pled HII's culpability in both of those practices, sufficient to withstand a challenge under Rule 12.

Moreover, much of HII's cited precedent is inaccurate or inapposite. For example, HII cites *Jamison v. Royal Caribbean Cruises, Ltd.*, No. 08-1513 WQH (NLS), 2009 WL 559722, *4 (S.D. Cal. Mar. 4, 2009), for the proposition that "references such as 'partner,' 'close affiliate'

[5] Available at http://investor.hiiquote.com/releasedetail.cfm?ReleaseID=775244.

and 'offered and marketed jointly' are insufficient to survive a motion to dismiss." Mot. at 5. That opinion, on examination, contains no such language. Instead, this case and HII's other cases stand only for the proposition that a bare recitation of the elements of alter ego liability is insufficient to link multiple defendants' conduct. *Id.* at *4 (involving vague allegations by a *pro se* plaintiff); *see also Rasidescu v. Midland Credit Mgmt., Inc.*, 435 F. Supp. 2d 1090, 1099 (S.D. Cal. 2006) (same); *In re Sagent Tech., Inc., Derivative Litig.*, 278 F. Supp. 2d 1079, 1094 (N.D. Cal. 2003) (faulting a plaintiff's failure to apportion bad acts between individual defendants where, among other defects, the acts were taken at a certain corporation during time periods in which certain defendants were not employed there).

Here, HII and/or its agents were responsible for false and deceptive practices causing the purchase of the policies by Plaintiffs and innumerable Class members. Compl. ¶ 39. HII, furthermore, admits that it works in close partnership with HCC on a range of functions. Indeed, HII's press release for the release of the Health*e*Med STM plan that Plaintiffs purchased, Compl. ¶¶ 22, 55, "announces the launch of Health*e*Med STM through its partnership with HCC Life Insurance Company," and states that it "creates customizable and affordable, high quality insurance products and supplemental services through partnerships." This cooperative joint venture, upon information and belief, gives rise to HII's vicarious or direct liability for the obstructive and bad-faith conduct of, among others, the customer service representatives who wrongly obstructed Plaintiffs and Class Members from obtaining claims payments. Compl. ¶ 72. And there can be no dispute that HII is responsible for the deceptive or misleading statements it made in marketing and selling the policies, as set forth below.

**B. The Complaint Alleges Facts Supporting a UCL Claim Against HII**

HII argues that it cannot possibly violate § 332 of the Insurance Code "because it is neither the insurer nor the insured." Mot. at 7.[6] HII is incorrect for two primary reasons.

First, the allegations of the complaint combined with the official and public records it references compel the conclusion that HII and HCC are partners or joint venturers, who under

[6] HII only briefly challenges Plaintiffs' satisfaction of the UCL's fraud prong, and its arguments fail for the reasons discussed in this section, as well as in Plaintiffs' discussion of how the specificity requirements of 9(b) are satisfied.

California law are generally liable for the acts of the other.[7] *See, e.g.*, *Orosco v. Sun-Diamond Corp*., 51 Cal. App. 4th 1659, 1670 (Cal. App. 5th Dist. 1997); *Rickless v. Temple*, 4 Cal. App. 3d 869, 894 (Cal. App. 2d Dist. Feb. 25, 1970). For example, the complaint alleges that HII is a "developer and administrator of" health insurance policies, Compl. ¶ 17, and that in a July 2013 press release HII announced the launch of its new short-term medical insurance product and described itself as a "partner" of HCC, Compl. ¶ 55. Further, that release characterizes the new health policy as "HII's new short-term medical plan with HCC," rather than the other way around; it conveys the impression that HII is not only HCC's partner but that it is the managing partner, with HCC merely helping HII to provide "HII's new short-term medical plan."

Bolstering that impression, the Montana Notice of Proposed Agency Action against HII, HCC and others referenced in ¶ 52 of the Complaint states that "[o]n information and belief, the HHI entities and the individuals behind these entities ***are the masterminds*** behind the short term medical policies at issue." *In the Matter of Health Insurance Innovations, Inc., et al*., Case No. INS-2015-348, Notice of Proposed Agency Action at 8 (May 9, 2016) (emphasis supplied). The Notice states that those policies "are routinely sold through misinformation and deception," and makes clear, both in the text and in two charts, that it views HII as the hub and HCC as one of the spokes of the operation. *Id*. at 3-5. The Notice further alleges that the "Respondent HII entities violated [Montana law] by acting as, and holding themselves out as, administrators for each Respondent insurer," including HCC. *Id*. at 19. In addition, it specifically alleges that HII created, operated, or knowingly profited from:

- "Misreprent[ing] pertinent facts or insurance policy provisions relating to coverages at issue";
- "Fail[ing] to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies";

[7] A joint venture "is an undertaking by two or more persons jointly to carry out a single business enterprise for profit," and is "virtually the same as" a partnership. *Weiner v. Fleischman*, 54 Cal. 3d 476, 482 (Cal. 1991) (internal citation omitted). Accordingly, "the courts freely apply partnership law to joint ventures when appropriate." *Id*.

- "Refus[ing] to pay claims without conducting a reasonable investigation based upon all available information"; and
- "Neglect[ing] to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."

*Id*. at 19-21.

The above-described allegations demonstrate that HCC and HII are partners or joint venturers in connection with marketing the short-term insurance policies at issue in this case. As such they are each liable for both their own acts and the acts of the other.

Second, even if HII is viewed as HCC's agent, it would still be liable for violating Ins. Code § 332, and therefore the UCL.[8] Notably, in *Dias v. Nationwide Life Ins. Co*., 700 F. Supp. 2d 1204 (E.D. Cal. 2010), the court found that even an agent of an insurer who could not make a binding contract on behalf of the insurer "could fraudulently induce the purchase of a policy through his solicitation activities by misrepresenting the nature of a product or policy term." *Id*. at 1221. *See also Boggio v. California-Western States Life Ins. Co*., 108 Cal. App. 2d 597, 599 (Cal. App. 1952) (noting circumstances in which applicant properly relied on representations of insurance agent); *Bass v. Farmers Mut. Protective Fire Ins. Co*., 21 Cal. App. 2d 21, 26, 68 (Cal. App. 1937). Here, the Complaint alleges that HII "cooperat[es] in the sale" of HCC policies, "with knowledge of HCC's practices." Compl. ¶ 17. It also alleges that the Montana Commissioner of Securities and Insurance has "detailed how unlicensed Producers worked with HII to sell HCC health insurance policies to unsuspecting Montana consumers." *Id*. ¶ 52. Those allegations are sufficient to raise a reasonable inference, at the pleading stage, that HII is an agent of HCC. *See* Cal. Ins. Code § 1621; Rest. 3d of Agency, §§ 2.01, 2.03, 3.03 (3rd 2006); *see also Zander v. Texaco, Inc*., 259 Cal. App. 2d 793, 800 (Cal. App. 3d Dist. 1968) ("A contract of

[8] HII's unscrupulous conduct is thus in derogation of important legislative policies and unfair within the meaning of the UCL's unfairness prong (which HII barely mentions). The alleged conduct is also unfair because there is no benefit to consumers to not having insurance, effectively, at the moment they need it most: when there are claims to pay. *See Ferrington v. McAfee, Inc*., No. 10-1455, 2010 WL 3910169, at *12-13 (N.D. Cal. Oct. 5, 2010) (describing both the "balancing" test (which compares the gravity of the plaintiff's harm to the utility of the defendant's conduct) and "tethering" test (which examines whether the alleged misconduct is tethered to a legislatively declared policy) that are both applied by California courts).

agency may be implied from the circumstances and conduct of the parties. The existence of an agency is a question of fact.").

In short, the Complaint contains sufficient allegations to support both HII as a partner or joint-venturer with HCC and HII as an agent of HCC. It thus states a UCL claim against HII as well as against HCC.

**C. The Complaint Alleges Facts Supporting an FAL Claim Against HII.**

Plaintiffs have also stated a claim against HII under Cal. Bus & Prof. Code § 17500 ("FAL" or "Section 17500"). Section 17500 applies to "any person, firm, corporation, or association," and prohibits, among other things, any entity to "cause to be made or disseminated . . . in any [] manner or means whatsoever . . . which is untrue or misleading, and which . . . should be known, to be untrue or misleading." *Id.* As noted above, the Complaint alleges that HII cooperates in selling and servicing HCC policies, that the two companies are in a self-described "strong and long-lasting partnership," and that they launched a short-term medical plan together. Compl. ¶ 17, 52, 55, 55 n.11. By cooperating in the sale of HCC policies, HII made or caused to be made the untrue and misleading statements and material omissions about HCC's policies, practices, and customer service. In servicing those policies, HII did the same. *See Brewer v. Indymac Bank*, 609 F. Supp. 2d 1104, 1124 (E.D. Cal. 2009) (plaintiffs stated claim under FAL by asserting that defendants' explanation of mortgage was misleading, deceptive, or ambiguous).

Lastly, HII is incorrect that Plaintiffs need to plead reliance upon specific statements. In fact, "reading reliance into the UCL and FAL would subvert the public protection aspects of those statutes." *Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1137 (C.D. Cal. 2005). This is because "the goal of both the UCL and FAL is the protection of consumers" and there may be "numerous situations in which the addition of a reliance requirement would foreclose the opportunity of many consumers to sue under the UCL and the FAL." *Id.* Claims for false advertising are evaluated from the vantage point of a reasonable consumer, and "whether consumers have been or will be misled is a factual question that cannot be resolved on a motion to dismiss." *Brewer*, 609 F. Supp. 2d at 1124. As discussed in greater detail in Plaintiffs' concurrently-filed Opposition to HCC's Motion to Dismiss, the Complaint alleges that both

Plaintiffs Azad and Buckley, as well as many other individuals, had numerous communications regarding their insurance policies. They spoke with customer service representatives, agents, and brokers; they received emails and letters; and they reviewed website content. Via these common and uniform communications, Plaintiffs and others were exposed to false, misleading, and misrepresentative statements as well as material omissions. Compl. ¶¶ 19-38, 42-48, 56, 63, 67, 73. Plaintiffs have stated a claim against HII under both the UCL and FAL.

**D. The Complaint Alleges Facts Supporting Breach of Contract and Bad Faith Against HII**

HII contends that Plaintiffs have not alleged facts to support a claim for its liability under contract or bad faith. HII is wrong.

Plaintiffs have alleged that HII sold, developed, and performed vital services under the insurance contracts Plaintiffs purchased. Compl. ¶¶ 22, 39, 55, 72. HII urges that because HCC was the underwriter of Plaintiffs' insurance contracts, it cannot be liable for the contractual wrongs. Mot. at 9. However, it is well-settled that "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902 (2009) (citing 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)). Here, at a minimum, HII's behind-the-scenes knowledge and close cooperation in the sale and administration of Plaintiffs' worthless insurance contracts, as described above and in the Complaint, render it equitably estopped from denying liability under a contract theory.

Plaintiffs have also stated a claim against HII for breach of the implied covent of good faith and fair dealing. Under California law, "a covenant of good faith and fair dealing is implied in every insurance contract." *Frommoethelydo v. Fire Ins. Exch.*, 42 Cal. 3d 208, 214 (1986); *see also Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1153 (Ct. App. 1990); *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 818-19 (1979). Here, HII breached the covenant. Plaintiffs allege Defendants, including HII, systematically frustrate expectations by erecting common and insurmountable roadblocks (including via unlawful post-claims underwriting) to paying claims,

without acknowledging they are doing so and even denying that they will never pay. Defendants hinder insureds' ability to perform by their claims. This is classic bad faith.

**E. The Complaint Alleges Facts Supporting Unjust Enrichment Against HII**

In stating that there is no claim for unjust enrichment, HII ignores recent Ninth Circuit authority holding that unjust enrichment is a claim for relief in and of itself. *See, e.g.*, *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014). While Plaintiffs recognize the case law providing that an unjust enrichment claim should not be brought alongside a UCL claim for restitution when it is duplicative, they respectfully submit that this is not a basis to dismiss Plaintiffs' claim, for various reasons.

First, in light of this recent Ninth Circuit authority, those holdings dismissing unjust enrichment claims at the pleading stage are hard to reconcile with the entitlement of alternative pleading under Rule 8 of the Federal Rules of Civil Procedure. Rule 8(d) establishes that unjust enrichment may be pled in the alternative to contract or statutory claims, as Plaintiffs have done here. Compl. ¶¶ 141-46.

Second, and relatedly, HII challenges the UCL claim. Although HII's arguments lack merit—for the reasons set forth in Section B above—HII cannot seriously dispute Plaintiffs' right to restitution in some form.

Third, Plaintiffs expressly seek both restitutionary *and* non-restitutionary disgorgement, making their claim non-duplicative on its face. Compl. at 30 (¶¶ C and D). And, as a substantive matter, Plaintiffs have alleged not only that Class members spent money they would not have had to spend, but that Defendants have been unjustly enriched in the form of "higher premiums *and* greater revenues than they would have enjoyed had they acted lawfully." Compl. ¶ 143. The type of recoupment enjoyed by all Defendants was expressly noted as not being limited to the nominal insurer, but included other economic gains beyond premiums. At the pleading stage, Plaintiffs have more than adequately alleged that all Defendants have been unjustly enriched.

Fourth, HII cites cases where courts had already made findings on other allegations that precluded the survival of an unjust enrichment claim. *See, e.g.*, *Samet v. Procter & Gamble Co.*, No. 5:12-CV-01891 PSG, 2013 WL 3124647, at *10 (N.D. Cal. June 18, 2013); *Brazil v. Dole*

*Food Co., Inc*., 935 F.Supp.2d 947, 967 (N.D. Cal. 2013). Unjust enrichment, which is synonymous with restitution in California law, has its own elements—and these elements do not track Plaintiffs' other claims: "The elements of an unjust enrichment claim are the receipt of a benefit and [the] unjust retention of the benefit at the expense of another." *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593, 80 Cal. Rptr. 3d 316, 323 (2008).

### F. The Court Should Reject HII's Motion to Strike as Disfavored and Unsupported

Rule 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "The function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citation omitted). Motions to strike are "generally disfavored because [they] may be used as delaying tactics and because of the strong policy favoring resolution of the merits." *Hernandez v. Dutch Goose, Inc.*, No. C 13-03537 LB, 2013 WL 5781476, at *3 (N.D. Cal. Oct. 25, 2013) (citation and internal quotation marks omitted).

A motion to strike should be denied "unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Coolsystems, Inc. v. Nice Recovery Sys. LLC*, No. 16-CV-02958-PJH, 2016 WL 6091577, at *2 (N.D. Cal. Oct. 19, 2016) (Hamilton, J.) (citation and internal quotation marks omitted). "Any doubt concerning the import of the allegations to be stricken weighs in favor of denying the motion to strike." *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 614 (N.D. Cal. 2007).

"Given the disfavored status of Rule 12(f) motions, courts often require a showing of prejudice by the moving party before granting the requested relief." *Meyer v. Bebe Stores, Inc.*, No. 14-CV-00267-YGR, 2015 WL 431148, at *5 (N.D. Cal. Feb. 2, 2015) (internal quotation marks omitted).

#### 1. Plaintiffs' Allegations Concerning Prior Cease and Desist Letters and Agency Action Are Anything but Immaterial

HII seeks to strike allegations that: (1) it received cease and desist letters from, at least,

the states of Michigan (on May 1, 2014), Arkansas (on March 28, 2016), and Montana (on May 9, 2016), all noting that it was selling short-term insurance plans through unlicensed brokers and/or through misinformation and deception; and (2) it was issued a Notice of Proposed Agency Action on May 9 by the Montana Commissioner of Securities and Insurance, detailing how unlicensed Producers worked with Defendant to sell HCC health insurance policies to unsuspecting Montana consumers. Compl. ¶¶ 51-52.

HII offers only one argument in favor of striking these allegations: that they are immaterial because Plaintiffs represent a California class and the cease and desist letters and agency actions stem from other states. Mot. at 11. This one sentence argument falls far short of making it "clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Coolsystems*, 2016 WL 6091577, at *2. Moreover, the cases cited by HII fair no better in terms of supporting its argument. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds* 510 U.S. 517 (1994) (affirming striking of allegations that were barred by the statute of limitations and by res judicata); *Davidson v. Kimberly-Clark Corp.*, No. C 14-1783 PJH, 2014 WL 3919857, at *11-12 (N.D. Cal. Aug. 8, 2014) (striking allegations of on-line articles/reports and websites because plaintiff did not allege that she read or relied on them). Here, neither a statute of limitations nor a res judicata concern is in play. In addition, the salience of the cease and desist letters and agency actions do not turn on whether Plaintiffs relied on them; rather, as discussed above, the import of these allegations is that they underscore the systematic nature of Defendant's practices, and in particular, Defendant's cooperation with HCC in selling practically worthless health insurance *all over the country*, including in California. *See supra* at Section B.

In light of the fact that "[a]ny doubt concerning the import of the allegations to be stricken weighs in favor of denying the motion to strike," *In re Wal-Mart Stores*, 505 F. Supp. 2d at 614, HII's motion should be denied.

**2. HII Fails to Articulate that It Is Prejudiced by Inclusion of Allegations Concerning the Cease and Desist Letters**

HII also fails to make the threshold showing that it is prejudiced by Plaintiffs' allegations

regarding prior cease and desist letters and agency action. *Meyer*, 2015 WL 431148, at *5. In fact, HII does not even argue that it faces any prejudice as a result of these allegations. In the absence of any other conceivable prejudice, the Court should deny HII's motion to strike Plaintiffs' allegations.

### G. Plaintiffs Should Be Permitted to Amend the Complaint if the Court Identifies Any Pleading Infirmities

"Dismissal without leave to amend is improper unless it is clear . . . the complaint could not be saved by any amendment." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009); Fed. R. Civ. P. 15(a)(2). "[R]equests for leave to amend should be granted with "extreme liberality." *Moss*, 572 F.3d at 972.

Plaintiffs have articulated viable legal theories for each of the claims discussed in this brief, and should be afforded an opportunity to allege more facts should the Court require it.

## CONCLUSION

For the reasons set forth above, HII's motion dismiss and to strike should be denied in its entirety.

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